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No. 45673-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v

KEITH DOW,

Appellant

STATE OF WASHINGTON
BY _____
DEPUTY

FILED
COURT OF APPEALS
DIVISION II
2014 SEP -4 AM 11:51

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR COWLITZ COUNTY

BRIEF BY APPELLANT OF ADDITION GROUNDS

KEITH I. DOW

Appellant

Dow, Keith 370228

MCC-TRU B-322

PO Box 888

Monroe WA 98272

Table of Contents

Table of Authorities

Section 1

Fifth Amendment Violations:

a) *Double Jeopardy*

The Argument for double Jeopardy does apply to this case even though it was not attached nor terminated.

"The underlying idea, one that is deeply ingrained in at least the Anglo–American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[1]

It is argued that Keith Dow was put twice in Jeopardy for the same alleged crime and by no fault of his own, was made to suffer the effects of a trial twice. We understand when jeopardy attaches and terminates, however crimes involving children give a unique upper hand to the State. The

statute of limitations in the state of Washington say that if a child is under the age of 14, the statute of limitations ends 3 years after the child's 18 birthday. Since this alleged crime occurred when the alleged victim was 3, the State has 18 years to try the case as many times as they please.

The argument is that the statute of limitations for child sex crimes is to allow the child to come forward with an allegation when he or she might be out of a situation of fear or control. But this instead allows the state to try an accused over and over in this allotted time as long as jeopardy was not attached and terminated. So if the trial was not going in the States favor, the state could ask for dismissal and retry later under better circumstances. This is exactly what happened in the case against Mr. Dow. The original trial was dismissed.**2** They State then appealed on grounds of an error in decision by the trial judge.**3** The appeal went to the Washington Supreme court where they ruled in favor of the trial judge.**4** This took place from 05-10-2006 through 2-11-2010. Almost 4 years. This gave the State the upper hand and ability to spuriously fabricate a case against Keith Dow as they were not able to in the original trial.**2** This absolutely played in

favor of the state and enhancing the ability of Keith Dow, even though innocent, to be found guilty. This also subjected Mr. Dow to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.

Even though the statute of limitations was put into place in good faith to protect children and ensure justice for those who are guilty, this is a loop hole that the State can take advantage of to gain an advantage in their prosecution.

b) *Witness against himself*

The fifth Amendment of the Constitution also states "*nor shall be compelled in any criminal case to be a witness against himself*". The State presented to the Jury Letters and phone calls from Keith Dow to Cecilia Walde and implied to the Jury a sense of guilt being admitted by Keith Dow.

The argument is made that these statements or any statement represented by the State as an admission by Keith Dow to be inadmissible as evidence as Corpus Delicti and Prima Facie evidence was never established or proved. The

State never proved that the fact of the act occurred. The act being child molestation and defined as contact with a child with the "Intent" of sexual gratification. The State could not provide any physical, DNA or firsthand eyewitness as evidence. The state only provided second hand testimony on what a 3 year old child said to someone else when that child was found incompetent and later unreliable. Since the fact that the "Act" by definition was never proved through Prima Facie evidence and Corpus Delicti, any statements should have been stricken from evidence. Counsel objected to these statements and the State, Aimee Hunter argued that "they were not a big deal". In closing arguments, the State argued just how important they were and the Jury was allowed to use these statements in deliberation.

During the first trial all statements were ruled to be NOT an admission, but to be exculpatory of guilt.2 However, since the state abused its rights of double jeopardy as argued in section 1a) of this brief, they were under better circumstances and Judge, and were allowed to present such statements and present them in a way to imply guilt by

admission. These statements should have never been allowed and shows an error in the trial court and decision.

Another argument to bearing Witness against Himself, is having to admit guilt as part of the sexual offender rehabilitation process. The State treats this as Mr. Dow voluntarily entered into a rehabilitation program and bears no prudence to the fact that Mr. Dow is innocent. Forcing an offender whether guilty or innocent to admit guilt is plainly a violation of one's Fifth Amendment right and would question the sincerity of the States reasoning for this action. It is argued that the state is not treating the admitting of guilt in relation to an AA program, that one has to admit to being an alcoholic before treatment can move forward, but instead it is argued that the State imposes this upon offenders whether guilty or innocent so no future actions may be taken against the State or on behalf and in favor of the accused offender in appeals or civil matters.

Mr. Dow asks the court for a reversal of verdict and acquittal due to double jeopardy and for the State implying guilt by admission with no Prima Facie evidence under Corpus Delicti resulting in an erroneous conviction. Mr. Dow

also asks Your Honor to strike the need to admit guilt as part of the program process as an alternative if the appeal is not won.

Section 2

Spurious Charge and Erroneous Conviction

a)*Bias*

Bias is a major factor in any case. It can be argued that bias plays a far greater role in sex crimes than in any other. We all want to make sure that sex offenders are tried and convicted for their crimes, but it can be argued that we as a society have tainted justice because of our bias towards child molesters and rapists. An accused is presumed innocent until proven guilty. This is untrue when it comes to sex crimes especially when children are allegedly involved. We would rather be safe than sorry. It could be argued that this bias whether conscious or not, runs deep in Prosecutors, Jurors and even some Judges.

Unfortunately this is now common knowledge with the public and for this reason it has become increasingly common

for spurious allegations all over the country. It is so common in child cases that there is even a title for it, S.A.I.D (Sexual Allegations in Divorce). This is not exclusive to an end of a marriage, but the end of any relationship whether it is intimate, business, or social. In short, a relationship ends or one party is not happy about an aspect of the relationship, so they fabricate spurious allegations of sexual abuse as punishment for personal resentments knowing that it has become increasingly easier for conviction due to bias.

Two cases I refer you to are from Cowlitz county Washington. The first being State v. Thomas Kennedy.[7] In this case an 11 year old girl, Cassandra Kennedy, accused her father of raping her three times. He was convicted on her words alone and an assumed physical evaluation. Cassandra later, when an adult, recanted and said that she concocted the allegation to make her father "go away," because he was drinking and smoking marijuana. Mr. Kennedy spent almost 10 years in prison because of bias of the crime and not because of the facts therein. This case has similar aspects to Mr. Dow's case.

The second case is State v. Bryce Lemmons.8 This case mirrors Keith Dow's case very closely. *According to court documents, Jessica Lemmons, then wife of Mr. Lemmons told sheriff's investigators in September 2010 that her daughter, then 4 years old, said she'd been sexually abused by Lemmons, her father. The girl was taken to CJAC, where an interviewer "interrogated" her for about 55 minutes, the suit said. During the interview, the girl "was extremely reluctant to implicate (her father), but the interviewer was relentless and succeeded in producing a series of improbable and almost magical statements of abuse at the hands of (Lemmons).".*9 In Lemmon's case, the State had absolutely no evidence to the crime other than hearsay from the mother and family members and a questionable statement and interview from the alleged victim. The case fell apart just like it did in Keith Dow's first trial.2

The reference of this case is important to display the bias and how Lemmon's and Dow's case is the standard set in Cowlitz County for such cases. Susana Baur, Cowlitz County DA, is known for aggressively prosecuting alleged child molesters even as going as far as creating CJAC (Children's

Justice and Advocacy Center) and heading it as President. *Baur opened CJAC using grant money and donations in a downtown Kelso office in 2009 as a hub for investigating child abuse cases. The group, which is independent of the county, hired a forensic interviewer trained to interview young abuse victims. According to CJAC proponents, this step was taken to prevent children from having to tell their stories over and over again to doctors, lawyers and detectives. In addition, the office provided one central place where abused juveniles could find other social services, Baur said at the time.*[9] The issue here is the bias this is creating. A child having to tell their stories multiple times to multiple people ensures that consistency of the story holds true. It is also argued that a sitting DA cannot participate in such an advocacy group without injecting bias into Ms. Baur's job as District Attorney. Furthermore it is argued that Ms. Baur's involvement with CJAC and its relationship in the justice process in Cowlitz County is a direct conflict of interest.

Again, this is all referenced to show Your Honor that bias has a firm foot hold in Cowlitz County especially in sexual crimes and that it is very common for these types of

spurious allegations to be fabricated, charged, tried and erroneously convicted.

Keith Dow asks the court for a reversal of verdict and acquittal due to the blatant bias of the DA, witnesses, Jury and arguably the Trial Judge. As an alternative, Mr. Dow asks Your Honor for a reversal for a new trial.

b) *Hearsay, Lack of knowledge and Fresh in Mind.*

Hearsay is another huge issue at hand. In the direct brief from Lila Silverstein, she argues hearsay in Depth. This brief of Additional Grounds comes at it from a slightly different angle. It is argued that All the alleged victims family and friends were hearsay witnesses. It is even argued that the Debra Johnson, the investigating officer in 2005 is a hearsay witness. This is argued from improper evidence gathering, lack of knowledge and fresh in mind.

During the first interview when the account was the most fresh in mind of the alleged victim (K.W), Debra Johnson did not record the interview even though it was

Washington State law since 1999 . Debra Johnson also had to ask the family of K.W for leading questions to get the answers she was seeking. This shows in the record by her testimony. Debra Johnson also had to refer to her notes (which were not written by her, but instead written by Olga Lozano who was not a detective or police officer) for almost every question asked by both the State and Defense. It is argued that Debra Johnson testifying by using only notes that were written by another party is far beyond the scope of Lack of Personal Knowledge and Fresh in Mind. There are also countless contradictions in the testimony of family members and of K.W. K.W was found to be incompetent in the first trial2 and unreliable in the second. But since K.W was found to be competent in the second, all hearsay witnesses were erroneously allowed. To further this, K.W when asked by Josh Baldwin about identifying Mr. Dow on Page 86 line 2-4, "but you can't remember for 100% sure" K.W replied, "no, like 50/50". Even though this was about identification, this can be extrapolated to all statements from K.W and there to, all of the hearsay witnesses.

The argument that Mr. Dow is making is that no one, had firsthand knowledge of the fact of the act. The act, child molestation as defined, was never proved with Prima Facie evidence under Corpus Delicti and why it was dismissed in the first trial2. The only one who had firsthand knowledge was K.W and she was found to be incompetent and later unreliable. But her statements never proved the fact of the act. Furthermore, a 3 year old with no physical, DNA or firsthand eyewitness evidence to corroborate her statements is supposed to tell us the act was molestation. The fact is, the State never proved the act of the crime ever happened. Instead we are left with only hearsay witnesses, with no personal knowledge to the fact of the act testifying that Mr. Dow Molested K.W with no corroborating evidence to back up the any of the hearsay testimony. This would be unfounded in any other criminal case. But as described Section 2a), bias of these crimes have a huge effect.

K.W went from saying nothing ever happened, to something did happened, to I don't know Keith Dow at all, to I know Mr. Dow but can't point him out without coaching, to a half dozen other accounts of how something may or may

not have happened and in ways that are physically improbable to impossible of happening. K.W also could not accurately describe Mr. Dow's penis or properly describe a penis in general, but we give the alleged victim the benefit of the doubt even though that is reserved for the accused.

Furthermore, most of the statements by family members were not gathered until 2010; 5 years after the alleged act that was never proven by the State to have occurred through Prima Facie evidence. These family members did not submit statements during the initial investigation or first trial2, but instead submitted statements in 2010 (to the same Olga Lozano who wrote Debra Johnson's notes in the initial interview and is not a detective or police officer) and were nothing more than hearsay of what K.W may or may not have said. Most of these statements by family members were of supposed statements K.W made years before 2010 which is clearly out of the range and scope most would consider to be Fresh in Mind. It is also clear from the record that Cecilia Walde made remarks to coaching K.W.

There is so many contradictions of witness statements it is disturbing. However, the argument here is in the error of

trial court allowing any of these witnesses to be allowed to testify before the jury. The State never proved that the act of molestation as defined. The witnesses had a lack of direct personal knowledge to the fact of the act as the act was never proved. Hearsay statements were gathered years after the unproven act of statements by K.W that were said years before which is all out of the scope of Fresh in Mind. It sounds very confusing and it is, but it would never be allowed in any other court to let Bob testify in 2013 on his statements gathered in 2010 that Sue told Bob in 2006 that John stole her computer in 2005 when no computer was found and no direct Prima Facie evidence was ever established that a crime happened or Sue's computer was ever stolen. But this is exactly what happened in Keith Dow's trial.

Mr. Dow asks the court for a reversal and new trial due to the error of the trial court allowing a conviction without Corpus Delicti and solely on hearsay evidence.

Section 3

Fourteenth Amendment Violation

a) *Equal Protection Clause*

Mr. Dow argues that his 14th Amendment right was violated as he did not receive equal protection under the law. As described in sections above, Mr. Dow, who is a U.S citizen, due to the alleged crime that was never proven under Corpus Delicti, was not awarded the same protection as other citizens charged in other crimes.

The extreme statute of limitations in child molestation cases giving the State an unfair advantage for prosecution is not equal. Using exculpatory statements by Mr. Dow and the State being allowed to use said statements to imply guilt by admission is not equal. Having to admit guilt for no reason other than prejudice of the crime as part of the sexual offenders program is not equal. Mr. Dow not being allowed a witness by the trial court to speak in favor of the defense is not equal and a violation.

Extreme bias for cases of this nature and allowing hearsay from witnesses with no direct personal knowledge and out of the scope of fresh in mind on a crime that was never proven to have happened as defined is not equal and a violation.

Mr. Dow asks the court for a reversal of verdict and acquittal due to these blatant violations by the state and as an alternative, a reversal for a new trial.

Conclusion

This case is not complicated and very complicated at the same time. It is not complicated in the sense that no Prima Facie evidence was given to support Corpus Delicti and that a crime was even committed as defined. The State never proved that the alleged crime ever happened and instead, that State spuriously tried and the Jury erroneously convicted Mr. Dow on hearsay and bias without any corroborating evidence. The State had no physical, DNA or firsthand eyewitness to support their claim and the hearsay witnesses to the act.

It is very complicated in the sense that this case has been ongoing for 9 years. Mr. Dow has been through trial once and won. The State appealed and it went to the Washington Supreme Court and lost. The state, by abusing the statute of limitations, tried Mr. Dow again putting him twice in Jeopardy for the same offense. This case has seen countless hearings, motions, judges and lawyers. It is an onion with many layers.

I ask Your Honor to please look deeply into this case. Please read the transcript thoroughly, objectively and with a keen eye. You will see the arguments in this brief to be true. You will see the lack of knowledge, the bias, and the inconsistencies on your own. You will see how a person charged with this type of crime, whether innocent or not, is treated unequal and unfairly under the law. You will also see the Malice of the state and the prosecutor Aimee Hunter.

Your honor, this is my life. This is not something where I can be wrongly convicted, spend time in prison and move on. This charge will stay with me and affect my daily life until my day on this Earth has come to an end. Please

look closely at this case and allow me to move on with my family or at least get a fair trial.

"The most sacred of the duties of a government is to do equal and impartial justice to all citizens."

Thomas Jefferson 1816

Again, as a society we want to protect children and I would agree, but at what cost? Do we give up our liberty? Do we not give equal and impartial justice to all citizens because of a mere allegation to a particular crime? I would argue no. This inequality of justice to protect children might seem like a good idea, but what if this happens to you, or your spouse, son, father, brother or friend? You will no longer think this inequality of justice for these alleged crimes is a good idea I can promise you that.

"It is not honorable to take mere legal advantage, when it happens to be contrary to justice."

Thomas Jefferson 1790

If we are not willing to give reasonable doubt to the accused and hold them innocent until proven guilty then I would say we have no justice. As K.W said. "like 50/50", and it seems that is enough to convict a person of these alleged crimes.

Thank you Your Honor for considering my brief of additional grounds. I apologize for being redundant and as I being a layman, for any misunderstanding of the law. I ask again with respect that Your Honor look deeply and carefully at this case. Thank you.

Mr. Dow Asks the court for a reversal of verdict and acquittal and as an alternative a reversal for a new trial. Mr. Dow also asks that the court strike self-admittance as part the "Offender Program".

Dated this 25th, of August 2014

Respectfully submitted by,

_____

Keith I. Dow

Appellant